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IN THE

Supreme Court of the United States

STEVEN G. LADY,

Petitioner,

v.

OUTBOARD MARINE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JAMES H. HEIDELBERG
COLINGO, WILLIAMS, HEIDELBERG, STEINBERGER & MCELHANEY, P.A.
711 Delmas Avenue
Pascagoula, MS 39568
(228) 762-8021

ROBERT H. KLONOFF
(*Counsel of Record*)
GREGORY A. CASTANIAS
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-5489

RICHARD A. CHESLEY
JONES, DAY, REAVIS & POGUE
77 West Wacker Drive
Chicago, IL 60601
(312) 782-3939

Counsel for Respondent

34 pp

QUESTION PRESENTED

Did the court below properly apply this Court's well-established preemption precedents, including *Geier v. American Honda Motor Co.* and *United States v. Locke* (both decided last Term), to hold that petitioner's Mississippi tort claim, which alleges that Outboard Marine Corporation had a duty to install propeller guards on its boats, is preempted by the Federal Boat Safety Act?

CORPORATE DISCLOSURE STATEMENT

Respondent Outboard Marine Corporation is a privately held corporation. No parent or publicly held company owns 10% or more of Outboard Marine Corporation's stock. On December 22, 2000, Outboard Marine Corporation filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Northern District of Illinois.

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RESPONDENT'S BRIEF IN OPPOSITION

The petition for certiorari ("Pet.") should be denied. The decision below, finding implied preemption of petitioner's Mississippi tort claim, was a careful, narrow, and correct application of this Court's preemption precedents, including *Geier v. American Honda Motor Co.*, 120 S. Ct. 1913 (2000), and *United States v. Locke*, 529 U.S. 89 (2000), both of which were decided only last Term. No court of appeals decision conflicts, or is alleged to conflict, with the decision below. Nor, for that matter, is there any conflict with the Texas Supreme Court's seven-year-old decision in *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex. 1994), as that decision did not issue an implied preemption holding and, in all events, relied on lower federal-court decisions since repudiated by this Court. To the extent that this case is said to involve issues similar to those in *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir.), *cert. granted*, 522 U.S. 978 (1997), *cert. dismissed*, 523 U.S. 1113 (1998), there is no longer a need for certiorari: This Court's intervening preemption decisions (*e.g.*, *Geier* and *Locke*), which were applied by the court of appeals below, have now resolved the fundamental preemption issues presented in that case. Finally, there are serious vehicle problems with the present case owing to the bankruptcy of respondent Outboard Marine Corporation ("OMC"), which raises substantial issues about this Court's power even to consider Lady's petition.

STATEMENT OF THE CASE

A. The Federal Boat Safety Act of 1971

The Federal Boat Safety Act of 1971 ("FBSA") was specifically designed to "improve boating safety and to foster greater development, use, and enjoyment of all the waters of the United States." P.L. 92-75, § 2, 85 Stat. 213, 214 (1971) (codified as amended at 46 U.S.C. §§ 4301-4311). A significant increase in the number of recreational boaters in the

United States required "a coordinated national boating safety program." S. Rep. No. 92-248, *reprinted in* 1971 U.S.C.C.A.N. 1333, 1333. With respect to boat design, the method Congress selected for implementing this "coordinated national . . . program" was "establishment of national construction and performance standards for boats and associated equipment." P.L. 92-75, § 2, 85 Stat. at 214. This decision reflected Congress's balancing of safety and economic policies: "The need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level." S. Rep. 92-248, 1971 U.S.C.C.A.N. at 1335.

The FBSA's structure reflects Congress's intent to accommodate safety and economic concerns. The statute "improve[s] boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the . . . Secretary of Transportation." *Id.* at 1333. The FBSA authorizes the Coast Guard, as the delegate of the Secretary of Transportation (*see* 49 C.F.R. § 1.46(n)(1)), to promulgate comprehensive national boat construction and performance standards:

> The Secretary may prescribe regulations —
>
> (1) establishing minimum safety standards for recreational vessels and associated equipment, and establishing procedures and tests required to measure conformance with those standards with each standard —
>
> (A) meeting the need for recreational vessel safety; and
>
> (B) being stated, insofar as practicable, in terms of performance;

> (2) requiring the installation, carrying, or use of associated equipment . . . .

46 U.S.C. § 4302(a). Congress recognized that "[w]hile the language of [section 4302(a)] is permissive and not mandatory, . . . initial standards will be promulgated as soon as practicable." S. Rep. 92-248, 1971 U.S.C.C.A.N. at 1338. "In prescribing regulations under this section," the FBSA also requires the Coast Guard to consult with the National Boating Safety Advisory Council ("NBSAC"), an expert body established by federal statute. 46 U.S.C. § 4302(c)(4); *see id.* § 13110.

Consistent with the "long history of preemption in maritime safety matters" (S. Rep. 92-248, 1971 U.S.C.C.A.N. at 1341), the FBSA preserves national uniformity by "preempt[ing] the field on boating standards or regulations." H.R. Rep. 92-324, at 11 (1971). The Coast Guard in particular had long pushed for a broad preemption provision in the FBSA. It was concerned with the "real and potential problem" of the states "developing requirements of their own law which are varied," resulting in a "lack of uniformity [that] is inconvenient and costly to manufacturer and boatman alike." *Hearings on H.R. 15041 Before the Subcomm. on Coast Guard, Coast and Geodetic Survey, and Navigation of the House Comm. on Merchant Marine and Fisheries*, 91st Cong. at 67 (1970) (statement of Adm. McClelland, Chief of the Office of Boat Safety, U.S. Coast Guard); *see also Hearings on S. 696 Before the Merchant Marine Subcomm. of the Comm. on Commerce*, 92d Cong. at 50 (1971) (statement of Adm. Bender, Commandant, U.S. Coast Guard). Accordingly, Congress included in the FBSA a broad preemption clause that establishes the Coast Guard as the exclusive source of recreational boat safety standards:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation

> establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306.

Section 4306's three express exceptions are each consistent with the FBSA's purpose of "provid[ing] uniform standards without the imposition of excessive special requirements by individual states." H.R. Rep. 98-338, *reprinted in* 1983 U.S.C C.A.N. 924, 972. States may (i) enforce standards that are "identical" to federal regulations; (ii) apply to the Secretary of Transportation for an exemption from preemption; and (iii) "regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State." 46 U.S.C. §§ 4305, 4306.

The last provision in the FBSA states that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." *Id.* § 4311(g). Congress explained that the provision, added as a "technical amendmen[t]" just before passage (117 Cong. Rec. 28,036 (July 29, 1971)), is intended only "to clarify" that

> mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary value.

S. Rep. 92-248, 1971 U.S.C.C.A.N. at 1352. Given the comprehensiveness of the FBSA's regulatory scheme, and the

unique federal interest in maritime safety matters, this provision "clarifies" that states may still exert regulatory authority in limited circumstances. For example, Congress specifically disclaimed intent to "preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern." *Id.* at 1341.

B. The Coast Guard's Studied Decision Not To Require Propeller Guards on Recreational Boats

Pursuant to its delegated authority, the Coast Guard began implementing a federal scheme of recreational boat safety regulation the day after the FBSA took effect. Because the Coast Guard understood section 4306 to preempt all state law setting recreational boat safety requirements, as a stop-gap measure it immediately exempted from preemption all state boat safety law "in effect on the effective date of the [FBSA]." 36 Fed. Reg. 15,764-65 (Aug. 11, 1971); *see* Pet. App. 37 n.21. About a year later, the Coast Guard issued a comprehensive set of federal regulations governing recreational boat design and performance. *See* 37 Fed. Reg. 15,776-85 (Aug. 4, 1972). These regulations cover a broad spectrum—*e.g.*, personal flotation devices; ventilation, fuel, and electrical systems; and flotation requirements. *See generally* 33 C.F.R., subch. S (1998). After issuing the regulations, the Coast Guard eliminated the blanket state-law exemption. *See* 38 Fed. Reg. 6914-15 (Mar. 8, 1973).

In 1988, the Coast Guard decided to determine whether to "move towards a federal requirement for some form of propeller guard." NBSAC, *Report of the Propeller Guard Subcomm.* App. A (Nov. 7, 1989) (hereafter "NBSAC Rep."). It charged NBSAC to:

> Review the available data on the prevention of propeller-strike accidents and the Coast Guard study of various

> methods of shrouding propellers to prevent contact with a person in the water[; and]
>
> Assess the arguments for and against some form of mechanical guard to protect against propeller strikes reflecting the positions of state boating law administrators, the recreational boating industry, and the boating public.

Id. NBSAC appointed a Propeller Guard Subcommittee ("Subcommittee") to carry out this task. *See* NBSAC Rep. at 1.

The Subcommittee was made up of representatives from numerous constituencies interested in the propeller guard issue, including state boat safety officials, members of recreational boating organizations, members of the general public, and representatives of the recreational boating industry. *See* NBSAC Rep. App. F. The Subcommittee conducted an exhaustive 18-month study to determine whether propeller guards would improve boating safety "without at the same time (a) creating some other hazard; (b) materially interfering with normal operations; or (c) being at economic costs disproportionate to the particular risk." NBSAC Rep. at 20.

Throughout its study, the Subcommittee published Federal Register notices of its public meetings (held in various locations around the country) and invited oral and written commentary from all interested parties.* *See id.* at 2-3. Public response to the Subcommittee's invitation was tremendous. The Subcommittee received oral testimony from and reviewed written reports by proponents and opponents of a recreational boat propeller guard requirement: medical experts, victims of propeller strike injuries, attorneys for propeller strike victims, engineers, propeller guard manufacturers, recreational boat

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* *See* 53 Fed. Reg. 33,210 (1988); *id.* at 43,070; *id.* at 43,069; 54 Fed. Reg. 15,068 (1989); *id.* at 15,066; *id.* at 42,138.

manufacturers, academic researchers, the Coast Guard, and lifeguard organizations. *See* NBSAC Rep. at 1-4 & App. B, App. C.

The Subcommittee considered numerous other sources of information relevant to its task. It took note that propeller guard advocates had engaged in a state-by-state campaign to require propeller guards via lawsuits and lobbying efforts. *See* NBSAC Rep. at 4-5. It reviewed detailed statistical analyses of the frequency of propeller guard accidents as compared to accidents that occur during other recreational activities. *See id.* at 9-10. It reviewed the design and performance characteristics of every type of propeller guard on the market, and even conducted on-water tests of propeller guards. *See id.* at 13-17.

At the end of the study, the Subcommittee reached a number of conclusions. It found that, relative to the number of serious injuries that occur in other outdoor recreational activities generally and boating accidents in particular, propeller strike injuries are exceedingly rare. *See* NBSAC Rep. at 9-10, 24 & App. F. And even with regard to these rare injuries, in which "[o]perator inexperience, incompetence, negligence, and alcoholic intake are significant contributing factors" (*id.* at 11), the Subcommittee concluded that propeller guards "at best . . . have only a negligible impact on improving boating safety." NBSAC Rep. at 23.

Moreover, the Subcommittee found that all types of propeller guards "can . . . be counter-productive and can create new hazards of equal or greater consequence" (*id.*) because they "present[] an underwater profile of significantly larger frontal area, thereby increasing the chances of contact" and "blunt trauma injury" (*id.* at 20), which is "often more severe" than propeller-inflicted cutting wounds (*id.* at 18-19). Furthermore, at speeds of greater that 10 miles per hour (speeds at which "approximately 80% of all accidents occur," *id.* at 11), propeller guards "affect boat operation adversely."

Id. at 21. "In the hands of an inexperienced or negligent operator, a serious accident could result." *Id.* at 16.

Finally, in addition to the general problems inherent in all types of propeller guards, the Subcommittee found specific drawbacks for each available propeller guard design. "Ring guard" designs allowed "fingers, hands, arms, etc. [to] enter the ring and contact the propeller." *Id.* at 12. "Cage guard" designs were feasible only for boats that "operate at very slow speeds (approximately 2 miles per hour or less) where problems of efficiency, structural integrity and boat handling are negligible" and "[n]o evidence indicated that this solution had any validity for normal use of pleasure boats at normal planing speeds." *Id.* at 15. A third design, the "Kort nozzle," was found to be inadequate as "[n]o example of any nozzle device suitable for recreational boat use at normal operating speeds was brought to the attention of the Subcommittee." *Id.* In summary, "[n]o simple universal design suitable for all boats and motors in existence ha[d] been described or demonstrated to be technologically or economically feasible." *Id.* at 22.

Acknowledging that "the controversy which currently surrounds the issue is, by its very nature, highly emotional and has attracted a great deal of publicity," the Subcommittee nonetheless concluded that "there are no indications that there is a generic or universal solution currently available or forseeable in the future." *Id.* at 24. Accordingly, the Subcommittee *unanimously* recommended that "[t]he U.S. Coast Guard . . . take *no regulatory action to require propeller guards*." *Id.* at 24 (emphasis added). Instead, the Subcommittee recommended that an emphasis on boater education was far preferable to requiring propeller guards: "The most rational approach to the problem [of propeller strikes] is to educate boaters, especially operators" because "[o]perator error is clearly a significant factor in the vast majority of underwater impacts which result in injuries [and]

fatalities." *Id.* at 23. In fact, the Subcommittee warned that imposing a propeller guard requirement would only "misle[a]d [the public] into thinking there is a 'safe' device which would eliminate or significantly reduce such injuries or fatalities." *Id.* at 24.

NBSAC received the Subcommittee's report at its annual meeting. It unanimously "accept[ed] the report, adopt[ed] the recommendations of the subcommittee, and discharge[d] the subcommittee as having completed its task." *Minutes of the 44th Meeting of the National Boating Safety Advisory Council* 19 (Nov. 6-7, 1989).

NBSAC forwarded the report and all supplementary materials to the Coast Guard, which, after careful review, accepted "[a]ll of the report's recommendations." Letter from Rear Admiral, U.S. Coast Guard, Robert T. Nelson, Chief, Office of Navigation Safety and Waterway Services to A. Newell Garden, Chairman, National Boating Safety Advisory Council at 1 (Feb. 1, 1990). The Coast Guard specifically noted that "available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats." *Id.*

C. The Proceedings Below

On May 7, 1995, petitioner Lady was operating a jet ski on the waters of Bayou La Croix, Mississippi. Richard Rychetsky was following closely in a motorboat. The two craft were traveling at 30 to 35 miles per hour within 20 feet of each other. When Rychetsky blew the horn on his boat, Lady reacted by making a hard left turn directly into the path of Rychetsky's boat, precipitating a collision. Lady was thrown from his jet ski, and the propeller on Rychetsky's boat struck and injured him. Pet. App. 2.

Lady settled his claims against Rychetsky (Pet. App. 3 n.1) and then filed product liability claims against Neal Glaser Marine, Inc., the distributor of Rychetsky's boat, and OMC,

the manufacturer, alleging that each breached a duty to install a propeller guard. Pet. App. 3. After OMC removed the case to federal court, Lady dismissed his claims against Neal Glaser Marine. *Id.*

The district court joined every federal court to decide the issue by ruling that the FBSA preempted Lady's claims. Pet. App. 40-47. The district court based its ruling on both express and implied preemption grounds: It held that the language of the FBSA expressly "preempts state laws or regulations that are not identical to regulations promulgated under the Act" (Pet. App. 42) and that, given "[t]he Coast Guard's decision not to regulate the installation of propeller guards," any tort-law-imposed propeller guard requirement "would not be identical to any [regulation] prescribed under the FBSA." Pet. App. 45. The court also held that a state-tort-law-imposed propeller guard requirement would conflict with the Coast Guard's "informed decision to refrain from regulating propeller guards" and, thus, that Lady's claims were impliedly preempted. *Id.*

The court of appeals affirmed. After observing that every federal court to decide this issue has held that the FBSA preempts propeller guard claims (Pet. App. 5-6), the court reviewed in detail the Coast Guard's exhaustive investigation of propeller guards. Pet. App. 7-18. The court then reviewed the numerous decisions of this Court, including the decision last Term in *United States v. Locke*, 529 U.S. 89 (2000), emphasizing that matters of maritime safety and commerce are "traditionally regulated by the federal government." Pet. App. 18-21. Because the FBSA likewise governs matters within "the historic federal maritime jurisdiction," the court of appeals held that "a presumption against preemption does not guide [the] analysis of whether federal law precludes Lady's common-law tort claims against OMC." Pet. App. 21.

Turning to the district court's express preemption holding, the court of appeals rejected Lady's assertion that the

language of the FBSA's preemption provision could not include tort claims, noting that a long line of this Court precedents "has interpreted language similar to section 4306's to include state common-law tort actions." Pet. App. 24. When assessing Lady's argument that the FBSA's so-called "savings" clause preserved tort actions, the court reviewed this Court's recent decision in *Geier v. American Honda Motor Co.*, 120 S. Ct. 1913 (2000), concerning the express preemptive reach of the Motor Vehicle Safety Act ("MVSA"). The court agreed that, like the MVSA, the FBSA contains a "savings" clause, but it also noted that the language of the FBSA's preemption and savings provisions differs significantly from the MVSA. Pet. App. 23-24. Still, concerned that *Geier* "precludes a broad reading of [an] express preemption provision" in "the presence of [a] savings clause," the court of appeals was "unable to conclude" that the FBSA expressly preempted Lady's claims. Pet. App. 27.

The court of appeals next turned to the district court's implied preemption holding. At the outset, the court held that the fact that an action is not expressly preempted by federal law "does not 'foreclose[] any possibility of implied preemption,'" a principle made clear by a number of this Court's decisions (including, most recently, *Geier*). Pet. App. 28 (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995), and citing *Geier* and *Locke*). The court then rejected Lady's argument that "*Freightliner*'s teachings . . . preclude implied preemption in the present case" because the Coast Guard did not promulgate a regulation concerning propeller guards on recreational boats: "In contrast to *Freightliner* . . . the lack of a regulation mandating propeller guards on recreational boats came after the Coast Guard studied the matter and affirmatively determined that requiring propeller guards was substantively inappropriate." Pet. App. 31. Moreover, the court of appeals pointed out, this Court repeatedly has held that "'a federal decision to forgo regulation in a given area may imply an authoritative federal

determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate.'" Pet. App. 33 (quoting *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983)). Specifically with regard to Coast Guard regulation of maritime safety matters, "the relevant inquiry [is] 'whether the Coast Guard promulgated its own requirement on the subject *or has decided that no such requirement should be imposed at all.*'" Pet. App. 34-35 (emphasis added) (quoting *Locke*, 529 U.S. at 109).

The court of appeals found that at the conclusion of an exhaustive examination of a possible propeller guard requirement, the Coast Guard reached a "considered decision that, on the merits of the matter, imposing a requirement for propeller guards was substantively inappropriate." Pet. App. 36. Just as the Department of Transportation in *Geier* had chosen to afford automobile manufacturers flexibility in selecting restraint systems, the Coast Guard explicitly "cho[se] . . . to leave manufacturers with the option of whether or not to attach a propeller guard and, if so, what type." Pet. App. 35-36. According to the court of appeals, allowing Lady to pursue his damages action "would effectively require boat manufacturers to install propeller guards, in direct contravention to the Coast Guard's policy." Such a rule of law "would present an obstacle to and frustrate the flexible approach towards propeller guards adopted by the Coast Guard," precisely the type of regulatory interference struck down in *Geier*. Pet. App. 36.

The court of appeals made clear that its decision was extremely narrow:

> We do not hold that simply because the Coast Guard has not acted on a safety matter that state action is precluded. Rather, where the Coast Guard has been presented with an issue, studied it, and affirmatively decided as a substantive matter that it was not appropriate to impose a

> requirement, that decision takes on the character of a regulation and the FBSA's objective of national uniformity mandates that state law not provide a result different than the Coast Guard's.

Pet. App. 37. It further limited the holding to tort actions like Lady's: "We also conclude that product liability claims based on the defective design, manufacture, or installation of products that are already installed and not subject to Coast Guard regulation are also not preempted." Pet. App. 38 n.22.

Finally, the court of appeals rejected Lady's contention that it should defer to the Solicitor General's view, presented in an *amicus* brief in *Lewis v. Brunswick Corp.*, No. 97-288, that the FBSA does not preempt propeller guard suits. In this case, neither the Solicitor General's nor the Department of Transportation's views on the preemptive scope of the FBSA were before the court of appeals. Pet. App. 38 n.23. In any event, the court held, the issue had no bearing on the outcome of the case: "[E]ven if we were to consider the position taken by the Solicitor General in *Lewis*, the weight we would place on it would not be sufficient to overcome the reasons supporting the application of implied preemption." *Id.*

REASONS FOR DENYING THE PETITION

This is not an appropriate case for certiorari. Only last Term, the Court established in *Geier v. American Honda Motor Co.*, 120 S. Ct. 1913 (2000), a framework by which courts are to determine the preemptive effect of a federal statute that contains both express preemption and savings clauses. And in *United States v. Locke*, 529 U.S. 89 (2000), the Court reemphasized that when applying conflict preemption principles to federal statutes that "bear upon national and international maritime commerce," there "is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Id.* at 108. The opinion below carefully applied these precedents to hold that

Lady's Mississippi tort claim is impliedly preempted by the FBSA, and carefully limited its decision to the particular regulatory circumstances and specific cause of action before it. Moreover, there is no split of authority on the question: The decision below accords with every decision rendered by a federal court on the preemptive effect of the FBSA. And Lady's assertion that the decision below conflicts with *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex. 1994), is misplaced: That case did not issue an implied preemption holding and, in any event, premised its discussion of implied preemption on cases and theories this Court has since explicitly rejected. Finally, and wholly apart from the lack of merit in the petition, OMC's bankruptcy filing creates a serious impediment to this Court's ability to consider this case. The automatic stay in bankruptcy precludes Lady from proceeding against OMC unless and until he obtains a lifting of that stay in bankruptcy court, a procedural maneuver that would be unwarranted, and that OMC would vigorously contest.

I. THE FIFTH CIRCUIT'S NARROW APPLICATION OF THIS COURT'S PREEMPTION PRECEDENTS CREATES NO CONFLICT WITH ANY DECISION OF THIS COURT, ANY LOWER FEDERAL COURT, OR ANY STATE COURT OF LAST RESORT

A. The Decision Below Was Extremely Narrow

The court of appeals made clear that its decision was extremely narrow. It expressly foreclosed any reading of its opinion for the proposition that mere regulatory inaction carries preemptive effect. Rather, the court below held that its decision turned on the particular regulatory circumstances presented. The "Coast Guard ha[d] been presented with an issue, studied it, and affirmatively decided as a substantive matter that it was not appropriate to impose a requirement." Pet. App. 37; *see also* Pet. App. 7-18 (reviewing the Coast

Guard's lengthy and elaborate propeller guard study). Accordingly, the Coast Guard's "decision t[ook] on the character of a regulation and the FBSA's objective of national uniformity mandates that state law not provide a result different than the Coast Guard's." *Id.*

Not only did the court below limit its holding to the specific regulatory circumstances before it, it also strictly limited the types of tort claims to which its preemption holding could be applied. The court held that "product liability claims based on the defective design, manufacture, or installation of products that are already installed and not subject to Coast Guard regulation are also not preempted." Pet. App. 38 n.22 (citation omitted).

Thus, contrary to Lady's characterization, the decision below is far from a "deep encroachment on the rights of the States to protect their citizens and of citizens to use the common law to protect themselves." Pet. 21. It is a narrow (and correct) application of this Court's precedents. Indeed, the court of appeals showed tremendous restraint in its holding; the court noted significant differences between the preemption and savings provisions of the MVSA (interpreted in *Geier*) and the FBSA (Pet. App. 23-24), and could properly have issued a broader ruling that the FBSA expressly preempts tort claims like Lady's.

B. The Decision Below Was Correct And Does Not Conflict With Any Decision Of This Court

The court below faithfully applied this Court's preemption case law in holding that the FBSA impliedly preempts Lady's tort claim. Thus, there is no error in the decision below that requires this Court's intervention.

In the courts below, Lady's principal argument against implied preemption was that the presence of an express preemption clause in the FBSA barred any consideration of an implied preemption theory. Whatever plausibility this

argument may have once had, the court of appeals correctly held that *Geier* disposed of it once and for all. Pet. App. 28; *see Buckman Co. v. Plaintiffs' Legal Comm.*, No. 98-1768, slip op. at 10 (U.S. Feb. 21, 2001) (this argument "must fail in light of our conclusion last Term in *Geier*). Lady does not contend that this holding was in error, nor could he. Indeed, Lady's curious decision (Pet. 24) to minimize the importance of *Geier* by mentioning it only once, and then only in a passing "see also" citation, cannot be explained by mere accident — his counsel also represented the petitioner in that case.

The court of appeals acknowledged (Pet. App. 32-33) this Court's repeated holdings that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (emphasis in original); *accord, e.g, Locke*, 529 U.S. at 109; *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988); *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 178 (1978). Here, the Coast Guard was "presented with an issue, studied it, and affirmatively decided as a substantive matter that it was not appropriate to impose a [propeller guard] requirement." Pet. App. 37. Thus, just as in *Geier*, "the rule of law sought to be imposed by Lady would present an obstacle to and frustrate the flexible approach towards propeller guards by the Coast Guard." Pet. App. 36.

Lady does not take issue with the principle that a decision to forgo regulation can have preemptive effect. *See* Pet. 18. Rather, Lady merely contends that the court below misapplied that well-established principle. Citing *Freightliner*, Lady argues that "the mere absence of federal regulation . . . has no preemptive effect whatsoever." Pet. 16. But the court below did not rely on "the mere absence of federal regulation" to ground its decision: "In contrast to *Freightliner* . . . the lack

of a regulation mandating propeller guards on recreational boats came after the Coast Guard studied the matter and affirmatively determined that requiring propeller guards was substantively inappropriate." Pet. App. 31.

Lady next contends that the court below erred by refusing to apply a presumption against preemption. Pet. 21-23. Again, there was no error. In *Locke*, this Court reaffirmed that, in areas such as federal regulation "bear[ing] upon national and international maritime commerce," "where there has been a history of significant federal presence," there is no presumption against preemption. 529 U.S. at 108. Indeed, when it enacted the FBSA, Congress invoked just such a "history of significant presence" by noting that the Act's preemption provisions were consistent with the "long history of preemption in maritime safety matters" and expressly stated a "need for uniformity applicable to vessels moving in interstate commerce." S. Rep. 92-248, 1971 U.S.C.C.A.N. at 1341. This Court likewise has held that regulation of safe recreational boat operation in territorial waters bears on national maritime commerce. *See Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 675 (1982). The court below properly applied these precedents in holding that the presumption against preemption did not apply. Pet. App. 18-21.

Finally, Lady contends that the court below erred by not affording deference to the Solicitor General's brief in *Lewis v. Brunswick Motors*, No. 97-288, which urged that the FBSA does not preempt tort claims. Pet. 24-25. This issue provides no basis for this Court's review because it had no bearing on the decision below. The court of appeals acknowledged this Court's statement in *Geier* that, in some circumstances, the views of an agency expressed in a brief of the Solicitor General may be entitled to "some weight." Pet. App. 38 n.23 (quoting *Geier*, 120 S. Ct. at 1926). But, the court held, "even if we were to consider the position taken by the

Solicitor General in *Lewis*," the arguments made in that brief "would not be sufficient to overcome the reasons supporting the application of implied preemption." Pet. App. 38 n.23. Moreover, the Solicitor General's brief in *Lewis* did not purport to represent the position of either the Coast Guard or the Department of Transportation, as neither agency joined that brief. *Cf.* Br. *Amicus Curiae* of the United States, *Geier v. Am. Honda Motor Co.*, 120 S. Ct. 1913 (2000) (signed by the Department of Transportation); Br. for the United States, *United States v. Locke*, 529 U.S. 89 (2000) (same). Nor could it have, as the Coast Guard has consistently taken the position that the FBSA preempts tort claims like Lady's. *See* Pet. App. 37 n.21; *supra* pp. 3-5. And the Coast Guard, not the Solicitor General, has been delegated authority to administer the FBSA, a necessary prerequisite to administrative deference. *See Geier*, 120 S. Ct. at 1926; *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990).

C. The Decision Below Does Not Conflict With Any Decision Of A Lower Federal Court Or State Court Of Last Resort

There is no split of authority concerning the preemptive effect of the FBSA. The Fifth Circuit's decision accorded with the results reached by *every* federal court to consider the issue. *See Lewis v. Brunswick Corp.*, 107 F.3d 1494, 1505-06 (11th Cir.), *cert. granted*, 522 U.S. 978 (1997), *cert. dismissed*, 523 U.S. 1113 (1998); *Carstensen v. Brunswick Corp.*, 49 F.3d 430, 433 (8th Cir. 1995); *Moss v. Outboard Marine Corp.*, 915 F. Supp. 183, 186 (E.D. Cal. 1996); *Davis v. Brunswick Corp.*, 854 F. Supp. 1574, 1581-82 (N.D. Ga. 1993); *Shield v. Bayliner Marine Corp.*, 822 F. Supp. 81, 84 (D. Conn. 1993); *Shields v. Outboard Marine Corp.*, 776 F. Supp. 1579, 1582 (M.D. Ga. 1991); *Mowery v. Mercury Marine*, 773 F. Supp. 1012, 1016 (N.D. Ohio 1991); *Parker v. Outboard Marine Corp.*, No. J90-001(L), slip op. at 2-3 (S.D. Miss. Feb. 25, 1991). It likewise accords with decisions

of state courts. *See, e.g., Ryan v. Brunswick Corp.*, 557 N.W.2d 541, 548-49 (Mich. 1997); *Farner v. Brunswick Corp.*, 607 N.E.2d 562, 566-67 (Ill. App. Ct. 1992).

In the face of this overwhelming and unanimous body of federal authority, Lady asserts that the Texas Supreme Court's split decision in *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex. 1994), is in "direct" conflict (Pet. 12) with the decision below. It is not. *Moore* and the decision below each held that the FBSA does not expressly preempt tort claims based on a failure to install a propeller guard. Pet. App. 27-28; *Moore*, 889 S.W.2d at 249-51. On that score, Lady cannot, and does not, claim a split of authority.

Neither does *Moore* conflict with the court of appeals' decision on the issue of implied preemption, for that issue was not squarely presented or decided in *Moore*. The Texas court simply noted that a position taken by the boat manufacturers "resemble[d] an implied preemption argument," which the court considered only "[f]or purposes of . . . discussion." 889 S.W.2d at 251 n.10. To the extent that the *Moore* court even can be said to have addressed an implied preemption argument, it issued no holding on the point; rather, it opined only that there "arguabl[y]" was no conflict between the Coast Guard's studied decision not to require propeller guards on recreational motorboats and a state tort claim premised on an alleged duty to install a propeller guard. *Id.* at 251.

Indeed, *Moore*'s reluctance to address an implied preemption argument stemmed from a reading of various decisions of this Court and the lower federal courts as "question[ing] the propriety of an implied preemption analysis when presented with an express preemption analysis." *Id.* at 251 n.10. This Court's decisions in *Freightliner*, *Geier*, and *Buckman Co.*, rendered after *Moore*, have now made crystal-clear that the presence of an express preemption clause does not alter in any way a court's obligation to undertake a full

implied preemption analysis. *See Buckman Co.*, No. 98-1768, slip op. at 10; *Geier*, 120 S. Ct. at 1919; *Freightliner*, 514 U.S. at 287-89. In fact, the three *Moore* dissenters accurately predicted that the majority's view would not withstand scrutiny. 889 S.W.2d at 254-55 (Phillips, C.J., dissenting). And there is no reason to believe that the Texas court would continue to follow its discredited prior opinion; that court has since explicitly recognized its obligation to follow this Court's binding implied-preemption decisions such as *Buckman Co.*, *Geier*, and *Freightliner*. *See, e.g., Worthy v. Collagen Corp.*, 967 S.W.2d 360, 367 (Tex. 1998) ("We are also bound to follow the decisions of the United States Supreme Court, the final authority on federal preemption issues.").

In summary, there is no "confusion among" or split "reflected in" lower federal court decisions (Pet. 15); quite to the contrary, those decisions demonstrate a uniformity of result. The federal courts have unanimously held that the FBSA preempts tort claims based on propeller-strike injuries. Furthermore, there is no divergence between the Texas Supreme Court and the decision below: The Texas court did not reach the issue of implied preemption, and that court's discussion of the issue was grounded in a rationale now authoritatively repudiated by subsequent decisions of this Court.

D. The Court Has Already Resolved The Preemption Issues Presented In *Lewis v. Brunswick Corp.*

So, too, this Court's recent preemption decisions dispose of the major theme of Lady's petition — this Court granted certiorari in *Lewis*, so it should do so here, too. Pet. 11-12. In the years since the Court dismissed *Lewis*, it has resolved the fundamental preemption issues that had been presented in that case. Accordingly, there is no basis for certiorari in this case.

The petition in *Lewis* presented two related questions. The

first was whether "it is constitutionally permissible to imply the federal pre-emption of state common law claims" when a statute contains express preemption and savings clauses. Pet. for Cert., *Lewis v. Brunswick Corp.*, No. 97-288, at i (emphasis omitted). The second was whether, in light of a savings clause, "torts of omission [can be] impliedly pre-empted." *Id.* The Court answered these questions last Term in *Geier*. The Court held that the presence of an express preemption provision and a savings clause "does *not* bar the ordinary working of conflict pre-emption principles." 120 S. Ct. at 1919 (emphasis in original). Furthermore, the cause of action in *Geier* was itself a "tort of omission"; the plaintiff alleged that an automobile manufacturer negligently failed to install air bags. *Id.* at 1916-17. This fact did not alter the preemption analysis at all; the question remains whether the cause of action "actually conflicts" with the federal regulatory scheme either by making it "'impossible' for private parties to comply with both state and federal law" or by "frustrat[ing] the accomplishment of a federal objective." *Id.* at 1921-22. Finally, *Geier* is part of an overall refinement of preemption analysis, as the Court decided three other cases on general preemption grounds last Term. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344 (2000); *United States v. Locke*, 529 U.S. 89 (2000).

Geier and this Court's other recent preemption decisions have clarified the general framework under which federal courts are to determine whether a federal statute preempts state law, and have specifically set forth a framework for determining whether a federal statute containing express preemption and savings clauses preempts a state tort claim. Indeed, Lady contended before the court below that the MVSA, which the Court interpreted in *Geier*, is "nearly identical to the Boat Safety Act." Pet. C.A. Br. at 22 n.7. The court below meticulously applied this Court's refined framework to find that Lady's claim was preempted, and its

decision does not conflict with any other decision addressing the preemptive scope of the FBSA. Other federal courts likewise have only just begun to apply the *Geier* framework to preemption cases. *See, e.g., James v. Mazda Motor Corp.*, 222 F.3d 1323, 1326-27 (11th Cir. 2000); *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 381-82 (7th Cir. 2000). Accordingly, reconsideration of the preemption framework established in *Geier* only last Term would be premature, and there is certainly no reason to take this case simply to apply that framework to a single narrow preemption issue raised by a single federal statute.

II. BECAUSE OUTBOARD MARINE CORPORATION HAS FILED FOR BANKRUPTCY, THIS CASE PRESENTS A POOR VEHICLE FOR CONSIDERING THE ISSUES PRESENTED IN THE PETITION

On December 22, 2000, OMC filed a Chapter 11 bankruptcy petition. *Outboard Marine Corp.*, Bankr. N.D. Ill. No. 00-37405 (Dec. 22, 2000). Accordingly, under 11 U.S.C. § 362(a)(1), any "continuation . . . of a judicial . . . action or proceeding against the debtor" is stayed. The automatic stay applies to "appeals in actions against the debtor as well as initial lawsuits." 3 *Collier on Bankruptcy* ¶ 362.03[3] (15th ed. 1997). Lady's claim is a judicial action that was commenced against OMC prior to its bankruptcy filing; the automatic stay thus precludes continuation of this action until such time as the bankruptcy is resolved. 11 U.S.C. § 362(c)(2). Indeed, Lady must take "any . . . action necessary to assure that [his] action does not continue" and his failure to do so will violate the stay. 3 *Collier on Bankruptcy* ¶ 362.03[3].

For Lady to continue to press his claim against OMC, he would have had to file a motion for relief from the automatic stay in the United States Bankruptcy Court for the Northern District of Illinois that demonstrated "cause." 11 U.S.C.

§ 362(d); *cf. Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995) ("If respondents believed [a] Section 105 Injunction [supplementing the automatic stay] was improper, they should have challenged it in the Bankruptcy Court."). He has not. And, in any event, the only federal court to have addressed the issue directly has held that a nondebtor's "interest in having the Supreme Court review" an adverse decision is not "cause" that would justify lifting the automatic stay, because that type of interest is "identical to the interests of most . . . creditors" and "the existence of [a] petition [for certiorari] alone" does not change the calculus. *In re Ionosphere Clubs, Inc.* 133 B.R. 5, 7-8 (S.D.N.Y. 1991). Furthermore, the precise relief Lady seeks is a remand to the district court for a trial on his state-law claim, which would of course be extremely disruptive to OMC's efforts to reorganize, even putting aside the disruptive and distracting Supreme Court litigation that Lady's petition presently seeks.

Moreover, unlike the petitioner-debtor in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), OMC will not ask that the stay be lifted to allow this case to proceed in this Court. *See* Br. for Petitioner and Cross-Respondent, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), at 11 n.8 ("Upon motion of [Soler] . . . the United States Bankruptcy Court . . . vacated the automatic stay with respect to proceedings in this Court."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 814 F.2d 844, 845 (1st Cir. 1987) (the bankrupt petitioner "sought and obtained a modification of the automatic stay permitting the [Supreme Court's consideration of the] case to go forward" because it "would be in the 'best interest' of the debtor estate"). To the contrary, OMC will contest vigorously any effort to lift the stay as applied to this case, as allowing Lady to continue his unsuccessful pursuit of a large money judgment against OMC is manifestly not in the "best interest" of OMC's estate in bankruptcy.

Thus, even were the Court to desire to visit the issues presented by Lady, it should await a more appropriate vehicle for doing so. If there is indeed "further confusion among the lower courts," as Lady suggests (Pet. 15), then another opportunity will surely present itself. Indeed, counsel for petitioner is also counsel for plaintiffs in another FBSA preemption case, *Sprietsma v. Mercury Marine*, Ill. No. 89492, currently pending in the Illinois Supreme Court. Under Lady's own view, other opportunities will come; there is no basis for this Court to use this exceedingly poor vehicle simply to take the "first opportunity since *Lewis*" (Pet. 12) to address these issues.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES H. HEIDELBERG
COLINGO, WILLIAMS,
HEIDELBERG, STEINBERGER
& MCELHANEY, P.A.
711 Delmas Avenue
Pascagoula, MS 39568
(228) 762-8021

ROBERT H. KLONOFF
(*Counsel of Record*)
GREGORY A. CASTANIAS
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-5489

RICHARD A. CHESLEY
JONES, DAY, REAVIS & POGUE
77 West Wacker Drive
Chicago, IL 60601
(312) 782-3939

Counsel for Respondent
Outboard Marine Corporation

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